IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JOHN CHRISTAKIS,
Plaintiff/Appellant,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
Defendant/Appellee.

No. 2 CA-CV 2013-0127
Filed October 22, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. C20103885
The Honorable Leslie Miller, Judge

AFFIRMED

COUNSEL

John Christakis, Mesa
In Propria Persona

Wright, Finlay & Zak, LLP, Phoenix
By Kim R. Lepore, Phoenix
and Brad E. Klein, Newport Beach, California
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Judge Vásquez concurred.

E S P I N O S A, Judge:

¶1 Appellant John Christakis appeals from the trial court's grant of summary judgment in favor of Appellee Mortgage Electronic Systems, Inc. (MERS). Christakis argues the court erred by either incorrectly applying A.R.S. § 33-811(C)[1] to find his claims waived, or by failing to find genuine issues of material fact precluding summary judgment. Alternatively, he contends the court's application of A.R.S. § 33-811(C) violated his constitutional due process rights. Christakis lastly claims summary judgment was inappropriate because MERS "committed the post-sale tort of wrongful foreclosure."[2] For the following reasons, we affirm.

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[1]Section 33-811(C), A.R.S., pertains to property held under deed of trust and states in relevant part:

> The trustor, its successors or assigns, and all persons to whom the trustee mails a notice of a sale under a trust deed pursuant to § 33-809 shall waive all defenses and objections to the sale not raised in an action that results in the issuance of a court order granting relief pursuant to rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. mountain standard time on the last business day before the scheduled date of the sale.

[2]Christakis intersperses his opening brief with claims not supported by argument and presents new arguments in his reply brief; we do not consider these claims and arguments. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (argument waived when not clearly raised and

Factual and Procedural Background

¶2 In August 2006, Christakis executed a promissory note (Note) in favor of Corstar Financial, Inc. (Corstar) for a loan of $180,000 to purchase a property on West Saint Claire Street in Tucson. He also signed a deed of trust (Deed of Trust), later recorded, that secured the Note and designated MERS a nominee for Corstar, its successors and assigns, and also as the beneficiary. Christakis lastly executed a notice of assignment transferring the servicing of his loan from Corstar to GMAC Mortgage Corporation as of October 2006. After multiple endorsements, the Note was apparently transferred to a securitized trust with HSBC Bank USA, N.A. as trustee.

¶3 In January 2009, Christakis stopped making regular monthly payments on the Loan and, over the next year, paid only sporadically, making his last payment in December 2009. In January 2010, GMAC informed Christakis he was in default and requested payment of $5,007.84 within thirty days. Christakis failed to respond, and GMAC sent him another letter in February informing him it intended to foreclose on the property.

¶4 In February 2010, MERS substituted Executive Trustee Services, LLC (ETS), as the trustee under the Deed of Trust. ETS then recorded a Notice of Trustee's Sale scheduled for May 20, 2010. Christakis did not cure his default, and the residence was sold to a third party.

¶5 On May 18, 2010, two days before the trustee's sale, Christakis filed the present lawsuit and recorded a Notice of Lis Pendens but he did not attempt to obtain an order enjoining the trustee's sale. On June 1, he filed an amended complaint alleging claims of quiet title, breach of contract, lack of authority to enforce

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argued in appellate brief); *Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, n.1, 111 P.3d 1003, 1005 n.1 (2005) (issues raised for first time in reply brief generally not considered). As a pro se litigant, Christakis is held to the same standards as an attorney. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 16, 17 P.3d 790, 793 (App. 2000).

the Note, violation of A.R.S. § 33-801, et seq., and wrongful trustee sale. MERS filed an answer on September 7.

¶6 In March 2013, MERS filed a motion for summary judgment on all claims. Following a hearing on the motion, the trial court granted it without explanation in an unsigned minute entry. Christakis filed a notice of appeal in June 2013. In October 2013, the court entered judgment for MERS.[3] We have jurisdiction over Christakis's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Summary Judgment

¶7 "In reviewing a summary judgment, our task is to determine de novo whether any genuine issues of material fact exist and whether the trial court incorrectly applied the law." *Parkway Bank & Trust Co. v. Zivkovic*, 232 Ariz. 286, ¶ 10, 304 P.3d 1109, 1112 (App. 2013). We view the facts and their reasonable inferences in a light most favorable to the party opposing the motion. *Ochser v. Funk*, 228 Ariz. 365, ¶ 11, 266 P.3d 1061, 1065 (2011). But we will affirm a court's grant of summary judgment if the result is correct for any reason. *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, ¶ 14, 32 P.3d 31, 36 (App. 2001).

¶8 Christakis first appears to argue the trial court erred by misapplying § 33-811(C) to his defenses and objections to the sale of his property, contending its waiver provision affects only the requirements set out in § 33-811(B).[4] Section 33–811(C), A.R.S.,

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[3]Although Christakis filed his notice of appeal before the trial court entered a formal judgment, its March decision set forth by minute entry resolved the issues before the court in full and the only remaining task was ministerial—the signing of the order. As such, we consider Christakis's notice of appeal effective. *See Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981); *see also Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011).

[4]In relevant part § 33–811(B) provides:

> The trustee's deed shall raise the presumption of compliance with the requirements of the deed of trust

provides "[t]he trustor . . . shall waive all defenses and objections to the sale not raised in an action that results in the issuance of [an injunction against the sale]."[5] Our supreme court has stated: "Under [§ 33-811(C)], a person who has defenses or objections to a properly noticed trustee's sale has one avenue for challenging the sale: filing for injunctive relief." *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, ¶ 10, 275 P.3d 598, 600 (2012). When the sale is complete "a person subject to § 33–811(C) cannot later challenge the sale based on pre-sale defenses or objections." *Id.* ¶ 11; *see also Sitton v. Deutsche Bank Nat'l Trust Co.*, 233 Ariz. 215, ¶ 12, 311 P.3d 237, 240 (App. 2013) ("If a trustor fails to obtain injunctive relief and a trustee's sale is completed, she waives all claims to title of the property."). The only defense remaining is lack of notice of the sale.[6] *Steinberger v. McVey ex rel. Cnty. of Maricopa*, 234 Ariz. 125, ¶ 42, 318 P.3d 419, 430 (App. 2014); *cf. In re Hills*, 299 B.R. 581, 586 (Bankr. D. Ariz. 2002) ("A foreclosure sale is void if there are grounds for

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> and this chapter relating to the exercise of the power of sale and the sale of the trust property, including recording, mailing, publishing and posting of notice of sale and the conduct of the sale.

[5]Christakis contends § 33-811(C) serves to waive only the requirements of § 33-811(B), citing legislative history. But only if the plain language of the statute is unclear do we "'consider other factors such as the statute's context, history, subject matter, effects and consequences, spirit, and purpose.'" *State v. Tyszkiewicz*, 209 Ariz. 457, ¶ 5, 104 P.3d 188, 190 (App. 2005), *quoting State v. Fell*, 203 Ariz. 186, ¶ 6, 52 P.3d 218, 220 (App. 2002).

[6]We note that claims of relief, defenses, and objections that are independent from a contest to the trustee's sale are not waived by § 33–811(C). *See, e.g., Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp.2d 755, 770 (D. Ariz. 2012) (statute does not restrict claims for relief that are independent of voiding trustee's sale); *Morgan AZ Fin., L.L.C. v. Gotses*, 235 Ariz. 21, ¶ 9, 326 P.3d 288, 291 (App. 2014) (under § 33–811(C) trustor does not waive defenses against a post-sale deficiency claim by lender).

equitable relief based on serious sale defects, including deliberate notice failure, fraud, misrepresentation, or concealment.").

¶9 Christakis argues his contractual rights under the Deed of Trust were not waived, pointing to a provision in the Deed of Trust stating:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration . . . . The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.

He asserts MERS breached this provision by "s[elling his] property before he could exercise his right to bring court action." Under § 33-811(C), however, this court has determined that all pre-sale defenses and objections to the sale are waived, including tort claims. *See Madison v. Groseth*, 230 Ariz. 8, ¶ 15, 279 P.3d 633, 638 (App. 2012) (trustor of deed of trust waived claims against foreclosure sale purchasers for conversion and fraud/deceit where trustor did not obtain injunction prior to trustee's sale as required by § 33-811(C)). Thus, as a pre-sale defense to the sale, Christakis's contract claim was waived. Additionally, as MERS observes, the contractual provision cited by Christakis gives the borrower the right to "bring a court action" but does not also include the right to a resolution of the action before a sale.

¶10 Christakis next claims MERS was not a beneficiary authorized to foreclose on the loan, the note was unenforceable because note and deed were split, and he was not in default, all defenses to the sale which he raised below.[7] However, although

[7]Even assuming Christakis's defenses and objections to the sale were not waived, they are unavailing and insufficient to preclude summary judgment. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir. 2011) (claim that MERS a sham beneficiary undercut by terms in Deed of Trust; "[b]y signing

Christakis filed an action for relief two days before the trustee's sale, he did not obtain or seek to obtain injunctive relief to enjoin the sale.[8] By failing to do so as required by A.R.S. § 33–811(C), Christakis waived his pre-sale claims for relief against MERS.

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the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents"); *In re Vasquez*, 228 Ariz. 357, ¶ 8, 266 P.3d 1053, 1055-56 (2011) (when note transferred, deed of trust also transferred by operation of law). Christakis chiefly appears to claim he created an issue of fact precluding summary judgment by his affidavit stating he was not in default. However, he provided no evidence of payments made but not credited, nor waiver of payments, and thus his affidavit is insufficient to defeat summary judgment. *See Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("Self-serving assertions without factual support in the record" not enough to defeat motion for summary judgment), *quoting Jones v. Merchants Nat'l Bank & Trust Co.*, 42 F.3d 1054, 1057 (7th Cir. 1994); *Margaret H. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 101, ¶ 10, 148 P.3d 1174, 1177 (App. 2006) (party's conclusory affidavit usually not enough to defeat motion for summary judgment). Further, Christakis's attempt to discredit MERS's evidence of non-payment for lack of an authenticating affidavit is also unpersuasive. He waived the argument below by submitting the same evidence with his response to summary judgment. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 7, 32 P.3d 39, 42 (App. 2001).

[8] Although Christakis filed a complaint and recorded a lis pendens, those are insufficient under the statute to preserve his objections. *See BT Capital, LLC*, 229 Ariz. 299, ¶ 14, 275 P.3d at 600 (party that failed to obtain injunction to prevent sale pursuant to § 33-811(C) cannot preserve objections merely by filing lawsuit and lis pendens). Christakis acknowledges having received GMAC's suggestion that he "hurry to the courthouse before the trustee sale and file for a temporary restraining order or preliminary injunction to halt the trustee sale." But he "told [the GMAC representative] that his contractual right to bring a court action to assert any defense against the . . . sale" did not require him to do so.

Constitutional Challenge

¶11 Christakis also appears to challenge the constitutionality of § 33-811(C), asserting "because a borrower owning a rental property should only suffer financial damages and cannot be granted a preliminary injunction by the trial court, then, via an unconstitutional statute, a borrower is deprived of its property without due process of law." We note that Christakis only tangentially raised this argument below[9] and failed to fulfill his obligation to notify state authorities of his constitutional claim as required by A.R.S. § 12-1841.[10] In our discretion, we nevertheless consider it. *See Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1140 (App. 2008); *State v. Gilfillan*, 196 Ariz. 396, n.4, 998 P.2d 1069, 1074 n.4 (App. 2000).

¶12 "Statutes are presumed constitutional and the burden of proof is on the opponent of the statute to show it infringes upon a constitutional guarantee or violates a constitutional principle." *State v. Casey*, 205 Ariz. 359, ¶ 11, 71 P.3d 351, 354 (2003), *quoting State v. Wagstaff*, 164 Ariz. 485, 494, 794 P.2d 118, 127 (1990); *see In re Maricopa Cnty. Juv. Action No. JT9065297*, 181 Ariz. 69, 81, 887 P.2d 599, 611 (App. 1994) (burden on challenger). Constitutional challenges are subject to our de novo review because they involve

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[9] MERS argues Christakis failed to challenge the constitutionality of A.R.S. § 33-811(C) below and therefore has waived appellate review of the issue. Christakis, however, briefly argued this point below in his objection to summary judgment, and MERS responded in its reply. We therefore address the argument.

[10] Section 12-1841, A.R.S., requires that:

> In any proceeding in which a state statute . . . is alleged to be unconstitutional, the attorney general and the speaker of the house of representatives and the president of the senate shall be served with a copy of the pleading, motion or document containing the allegation at the same time the other parties in the action are served and shall be entitled to be heard.

questions of law. *Duarte v. State ex rel. Lewis*, 193 Ariz. 167, ¶ 4, 971 P.2d 214, 216 (App. 1998).

A.R.S. § 33-811(C) and Due Process

¶13 Christakis argues this court "should find that ARS § 33-811(C) stands as a misinterpreted tool by which a lender denies a borrower's right to due process of law before the deprivation of his property and [is therefore] unconstitutional."[11] Christakis thus appears to mount a facial challenge to § 33-811(C) arguing it deprived him of due process of law. "'Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner.'" *Cook v. Losnegard*, 228 Ariz. 202, ¶ 18, 265 P.3d 384, 388 (App. 2011), *quoting Curtis v. Richardson*, 212 Ariz. 308, ¶ 16, 131 P.3d 480, 484 (App. 2006). In the context of a trustee sale, property owners must be provided ample notice of a trustee sale to afford them the necessary time to protect their interests. *See* A.R.S. § 33–807(D) (power of sale not exercisable before ninety-first day after date of recording notice of sale); § 33-809(C) (notice to be sent to borrower within five business days after recordation of notice of sale). Christakis does not allege he lacked notice of the trustee sale as provided for by law. He nevertheless chose to wait until two days before the sale, and then to file a lawsuit, rather than an action for injunctive relief. Christakis thus lost his rights because he failed to act in a timely manner, not because he was denied due process.

As-Applied Constitutional Challenge to § 33-811

¶14 Christakis next contends the application of § 33-811(C) deprived him of due process because "a borrower owning a rental property should only suffer financial damages and cannot be

[11]It is somewhat unclear whether Christakis is claiming that MERS has denied him due process of law or that § 33-811(C) is invalid for having the same effect. To the extent he claims the former, his argument fails as this court has previously found due process requirements inapplicable to a private deed of trust sale because such a sale does not constitute state action. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 24, 17 P.3d 790, 795 (App. 2000).

granted a preliminary injunction by the trial court." As Christakis observes, a court has discretion to issue a preliminary injunction when a party establishes (1) a strong likelihood of success on the merits; (2) the possibility of injury not remediable by damages; (3) a balance of hardships in the plaintiff's favor; and (4) public policy favors the injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). Our supreme court has held "the scale is not absolute, but sliding," *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 10, 132 P.3d 1187, 1190-91 (2006), and observed: "'the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply' in favor of the moving party." *Id.*, *quoting Shoen*, 167 Ariz. at 63, 804 P.2d at 792. Thus, a strong likelihood of success on the merits may lessen the showing of irreparable harm. *Id.*

¶15 Christakis argues he was unable to establish the first prong of the test—"strong likelihood of success on the merits"—"without the right to discovery requests (i.e., confronting the lender and the loan servicer by using interrogatories, admissions and documents requests)" and was therefore denied due process. But that argument is unpersuasive. Christakis could have presented his evidence and also could have elicited additional evidence at the required hearing. *See McCarthy W. Constructors, Inc. v. Phoenix Resort Corp.*, 169 Ariz. 520, 525, 821 P.2d 181, 186 (App. 1991) (no preliminary injunction without opportunity for a hearing where witnesses heard and parties proceeded against have right to be heard, much the same as a trial). As MERS notes, Christakis "could have presented his evidence demonstrating his chances of success on the merits and was entitled to question [MERS]'s witnesses, if he so desired." Accordingly, Christakis's argument lacks merit.

¶16 Christakis next asserts, citing non-binding authority, that because foreclosure would cause him a purely financial injury, not considered irreparable, he could not have satisfied the requisite element of "irreparable injury" for an injunction. But Arizona courts have not held that purely economic injuries are inappropriate for injunctive relief. *See IB Property Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, n.3, 263 P.3d 69, 73 n.3 (App.

2011) (finding no binding authority to support argument that purely economic injuries inappropriate for injunctive relief). Indeed, this court has indicated the contrary. "Monetary damages may provide an adequate remedy at law," but where a loss is uncertain, monetary damages may be inadequate. *Id.* ¶ 10. Christakis, therefore, was not precluded from seeking an injunction for solely financial harm. Further, in evaluating such relief, Arizona courts would assess "irreparable injury" in light of § 33-811(C); that is, if an injunction were not to issue, the property owner would forfeit all pre-sale claims.

Tort of Wrongful Foreclosure

¶17 Finally, Christakis urges this court to "recognize the tort of wrongful foreclosure in the state of Arizona and . . . defin[e] the boundaries of the tort." Christakis is correct that Arizona courts have not recognized the tort of wrongful foreclosure,[12] but he has not established that it would be appropriate for us to do so in this case, particularly in view of his failure to rebut MERS's evidence that he simply defaulted on his loan without tender or excuse. *See In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 784 (9th Cir. 2014) (any recognition by Arizona of wrongful foreclosure likely to include requirement to cure default, citing California and Nevada law which contain such requirement); *cf.* A.R.S. § 33–807(A) (providing for a power of sale only after a breach or default in performance of the contract or contracts).

Attorney Fees and Costs

¶18 MERS requests its reasonable attorney fees and costs on appeal, but does not "state the statute, rule, decisional law, contract,

[12] Arizona courts have not addressed whether the tort of wrongful foreclosure is a pre-sale claim and thus waived by § 33-811(C), or a post-sale claim, which would remain viable. We observe, however, that the United States District Court for the District of Arizona has held that the tort ripens only after a foreclosure has occurred. *See, e.g.*, *Jones v. Bank of Am.*, 2010 WL 2228517, at *3 (D. Ariz. 2010).

or other provision" authorizing such an award. Ariz. R. Civ. App. P. 21(a)(2). We therefore decline its request. *See id.* As the prevailing party on appeal, however, MERS is entitled to an award of costs upon compliance with Rule 21.

Disposition

¶19 For the reasons stated above, the trial court's grant of summary judgment in favor of MERS is affirmed.